



**THE ATTORNEY GENERAL
OF TEXAS**

February 13, 1987

**JIM MATTOX
ATTORNEY GENERAL**

G. V. Brindley, Jr., M.D.
Executive Director
Texas State Board of
Medical Examiners
P. O. Box 13562
Austin, Texas 78711

Open Records Decision No. 458

Re: Whether sections 4.05 and 5.06(e)(1) of article 4495b, V.T.C.S., applied through section 3(a)(1) of the Open Records Act, article 6252-17a, V.T.C.S., authorize the Texas Board of Medical Examiners to withhold certain information relating to complaints against licensees

Dear Dr. Brindley:

You have asked if the Open Records Act, article 6252-17a, V.T.C.S., requires the Texas State Board of Medical Examiners to grant a request for information. The requestor seeks:

1. a list of the source and nature of complaints filed against physicians in Harris County for 1985. If you do not have such a list, then I would like to examine all of the complaints to determine which originated in Harris County. I am only interested in where these complaints originated, therefore I do not need names.

2. the names and addresses of physicians in Harris County who were disciplined by your board in 1985 and 1986. I also want the type of disciplinary action taken and the reason for the disciplinary action. I presume all this would be contained in the orders of the board, which are public per article 4495b, section 5.06(e), V.T.C.S.

3. all information on physicians in Harris County for 1985 and 1986 which is listed in article 4495b, section 5.06(e)(1), including all reports, investigations and court actions. I am asking for an exception to confidentiality under subsection (D). I am a newspaper reporter and this information is for research or educational

purposes. This allows you to delete personally identifiable information.

You agree that the second part of this request involves public records. Thus, we need address only the first and third issues.

You claim that section 3(a)(1) of the act, which prohibits the release of information deemed confidential by law, embraces the first part of the request. You argue:

The first requested class of information is for 'source and nature of complaints' against Harris County physicians for 1985. This is the class of information for which a specific statutory privilege [exists] in section 4.05(d) of the Medical Practices Act, article 4495b, V.T.C.S.

Section 4.05(d) provides in part:

All complaints, adverse reports, and investigation files and reports received or gathered by the board relating to a licensee, an application for license, or a criminal investigation or proceedings are privileged.

In a letter to this office, the requestor asserted:

The director of the Texas State Board of Medical Examiners wants to deny me access to records showing the source and nature of complaints filed against physicians in Harris County in 1985. Yet, the director provided me with a list of the same for 1986. I am enclosing a copy of what I was provided with. Surely I am also entitled to this information for 1985.

The 1986 list to which the requestor referred includes two kinds of information: the number of complaints received from seven different sources, e.g., "consumers," and a breakdown of the complaints into 22 different categories, e.g., "unprofessional conduct likely to deceive or defraud." It includes no information that would tend to identify particular physicians. We understand that the requestor wants precisely the same list for 1985.

If the board does not maintain this statistical information for 1985, it is not required to compile it. See Open Records Decision No. 452 (1986) (act does not require preparation of new material). If, however, the board does possess this list, several intriguing questions are raised. Does section 4.05(d) of article 4495b, which makes certain information "privileged," embrace this list? See Open Records Decision No. 290 (1981) (words "privileged" and "confidential"

not necessarily synonymous for purposes of section 23 of article 4512c, V.T.C.S.). If it does, what is the legal effect of the director's having released the 1986 list, assuming he did so?

We stress that the requestor has not asked for actual "complaints," "adverse reports," or "investigation files and reports received or gathered by the board relating to a licensee, an application for a license, or a criminal investigation." V.T.C.S. art. 4495b, §4.05(d). If he had, his request would be squarely within section 4.05(d). Instead, he seeks statistical information concerning complaints -- information which reveals nothing about the subjects of the complaints. The language of article 4495b fails to settle the issue of whether this information should be deemed to be within section 4.05(d). We must therefore answer this question as we believe the legislature which enacted this provision would have answered it. See Jessen Associates, Inc. v. Bullock, 531 S.W.2d 593 (Tex. 1975) (legislative intent is dominant consideration in statutory construction).

Section 4.05(d) is part of subchapter D of article 4495b, which establishes detailed procedures for handling complaints against physicians. If one considers this subchapter as a whole, see Taylor v. Firemen's and Policemen's Civil Service Commission, 616 S.W.2d 187 (Tex. 1981) (statutory construction must focus on entire act rather than on isolated provisions thereof), it becomes apparent that the intent of its confidentiality provisions is to shield the identities of licensees against whom complaints are filed, most likely to protect their reputations. In view of this, it follows that documents requested here, which are not actual "complaints," "adverse reports," or "investigation files and reports," but which contain information relating thereto, should be held to be within section 4.05(d) only to the extent that the disclosure of their contents would tend to reveal the identities of physicians against whom complaints have been filed.

As noted, the requestor seeks exactly the same information for 1985 that appears in the 1986 list which he submitted to us. As also noted, the information in this list in no way tends to identify particular physicians. Accordingly, we conclude that section 4.05(d) does not apply to this list, assuming that the board possesses it. It follows from this that we need not consider whether the word "privileged" in this section is interchangeable with "confidential."

We now consider the third part of this request. In your letter, you stated:

[This part] falls not only into the exception created by section 4.05(d) of the act, but also section 5.06(e)(1) as being strictly confidential if the information relates to any report by a medical peer review committee, any physician practicing medicine or in medical education

training or by a medical student. This particular request purports to be based on the exception for 'research or educational purposes.' Other than the mere assertion of the exception category there is no substantiation as to qualifications of the personnel or the bona fide-ness [sic] of the research or education purpose to be served by the disclosure of this information. This information falls in the exception of section 3(a)(1) of the Open Records Act as it is deemed either privileged under section 4.05(d) or strictly confidential under section 5.06(e)(1) of the act.

Section 5.06(e)(1) of article 4495b provides in relevant part:

Reports, information, or records received and maintained by the board pursuant to this section and section 5.05 of this act, including any material received or developed by the board during an investigation or hearing, are strictly confidential and subject to the provisions of Subdivision (4) of this subsection [providing that disclosure of this information constitutes a Class A misdemeanor]. However, the board may disclose this confidential information only:

. . . .

(D) to qualified personnel for bona fide research or educational purposes, if personally identifiable information relating to any person or physician is first deleted. (Emphasis added).

In his letter to this office, the requestor stated:

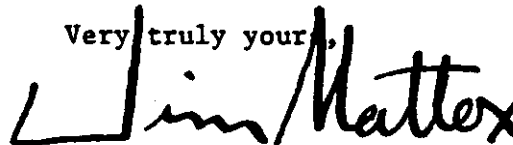
The director wants to deny me access to reports, investigations and court actions on physicians in Harris County for 1985 and 1986. This [sic] records are normally confidential, but I have asked for an exception under article 4495b, section 5.06(e)(1)(D), which allows these records to be released for research or educational purposes, as long as names and personally identifiable information is deleted. I have requested this information under subsection (D). I am a bona fide newspaper reporter for a newspaper, The Houston Post, which has a daily readership of more than 1 million people in Harris County. I need the information requested as part of the research for a newspaper article I was assigned to write about complaints against

physicians in Harris County. This is just as bona fide a purpose as any other research printed in any other publication in this state. The more than 1 million readers of The Post will be informed and educated about an important public matter.

Article 4495b sheds no light on the issues of how, and by whom, the terms "qualified personnel" and "bona fide research or educational purposes" in section 5.06(e)(1)(D) are to be construed. It would appear that, as the agency charged with implementing this article, the Board of Medical Examiners should be accorded leeway in formulating its own interpretations. See Ex parte Roloff, 510 S.W.2d 913 (Tex. 1974) (where statute is ambiguous, construction placed on it by agency charged with its administration is entitled to weight). We need not resolve this definitional problem, however, because the language of section 5.06(e)(1) plainly establishes that regardless of how these terms are construed, it is within the board's discretion to decide whether and to what extent to release confidential information for research or educational purposes. This section states that the board "may" disclose confidential information for such purposes, not that it must or shall do so. The word "may" is generally regarded as permissive in character. See, e.g., Bloom v. Texas State Board of Examiners of Psychologists, 492 S.W.2d 460, 462 (Tex. 1973) (use of word "may" in section 15(b) of article 4512c, V.T.C.S., means that board has discretion in its administration of statute's stated standards); San Angelo National Bank v. Fitzpatrick, 30 S.W. 1053, 1054 (Tex. 1895) ("in its primary and ordinary signification, [may] is a word of permission, and not a word of command").

We therefore conclude that section 4.05(d) of article 4495b does not embrace the statistical information at issue in the first part of this request, and there is no suggestion that it comes within section 5.06. If the board maintains this information, it must release it, as no other exception authorizing the withholding of this information has been cited. See Open Records Decision No. 325 (1982) (except for section 3(a)(1), attorney general does not raise exceptions on behalf of the governmental bodies). Section 5.06(e)(1) of article 4495b does not require the release of the information described in the third part of the request.

Very truly yours,



J I M M A T T O X

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